if there was no prior agreement between the parties that the title to the land was to be taken in the name of the person furnishing the money, and a "constructive trust" arises if there was such an agreement, making the taking of the title in the grantee's name tortious.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Constructive Trust; Implied Trust. For other cases, see 13 Va.-W. Va. Enc. Dig. 276.]

11. Trusts (§ 79*)—Trust Results in Favor of One Paying Part of Price of Land.—Where two or more persons together advance the price of land, and the title is taken in the name of one of them, a trust will result in favor of the others in respect to an undivided share of the property proportioned to his share of the price; the doctrine in all its phases applying alike to personal and to real property.

[Ed. Note.— For other cases, see 13 Va.-W. Va. Enc. Dig. 276.]

Appeal from Circuit Court, Washington County.

Suit in equity by the children of William A. Castle against the children of Robert Mumpower. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Jno. J. Stuart, of Abingdon, and *S. B. Campbell,* of Wytheville, for appellants.

Hutton & Hutton and *L. P. Summers,* all of Abingdon, for appellees.

PAYNE et al. *v.* PAYNE et al.

Sept. 16, 1920.

[104 S. E. 712.]

1. Descent and Distribution (§ 109*)—Hotchpot Applies to Partial Intestacy.—At the common law the doctrine of hotchpot only applied when the decedent died wholly intestate, while under Code 1919, § 5278, it is only necessary that there be a partial intestacy.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 192.]

2. Descent and Distribution (§ 109*)—Intent of Statute Relating to Hotchpot Stated; "Advancement."—The intent of Code 1919, § 5278, is to bring about, as nearly as may be, an equal division of the estate of a decedent among his children or other defendants, except so far as he may have himself distributed his estate unequally, and the doctrine does not apply unless the property has been received from the ancestor, either in his lifetime or by his will, and by way of advancement, which is defined as a gift from

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

an ancestor to a descendant for the purpose of advancing him in life in anticipation of the final division of the donor's estate after his death, the intention of the testator determining the question as to whether or not a gift is an advancement; and, if one elects to account for his advancement, he is entitled to share in the property to be divided, being charged with the value of the advancement; on the other hand, if he elects not to do so, he will be debarred from participation in further distribution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Advancement. For other cases, see 1 Va.-W. Va. Enc. Dig. 190, et seq.]

3. Descent and Distribution (§ 99*)—Grants of Land Referred to in Will Held Intended as Advancements.—In an action by heirs of a decedent partially intestate seeking to apply the doctrine of hotch-pot, grants of land by deeds referred to in the will held intended by decedent to be advancements.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig 190, et seq.]

4. Wills (§ 782 (1)*)—Bequest to Wife Presumed to Be Intended in Lieu of Dower.—Under Code 1919, § 5120, a devise or bequest to the wife shall be taken to be intended in lieu of dower, unless the contrary intention plainly appears in the will or in some other writing signed by the party making the provision.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 809.]

5. Deeds (§ 208 (1)*)—Deed Mentioned in Will Held Delivered.—Circumstances, language of will mentioning it, and subsequent action in acknowledging a deed and placing it with his will held to clearly indicate testator's intention to deliver the deed to the grantee and to make it operative as a deed at the time of its execution.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 406.]

6. Wills (§ 106*)—Deed May Be Referred to to Identify Property.—A deed, even if undelivered, may be referred to in a will to identify the property, when devised by the grantor to the grantee named in the deed.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 796, et seq.]

7. Wills (§ 440*)—Intention Must Be Ascertained from Words Used.—In construing a will, the courts must ascertain the intention of the testator from the words used therein, and, if this intention is manifest, the will is effective.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 780, et seq.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

8. Wills (§ 489 (1), 490*)—Parol Evidence Admissible to Identify Subject and Object.—Where a will does not specifically describe land devised, parol evidence is always admissible to identify the land, and also to identify the beneficiary.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 789, et seq.]

Appeal from Circuit Court, Tazewell County.

Suit by George Arthur Payne and another against J. Payne and others. Decree for plaintiffs, and defendants appeal. Affirmed.

S. M. B. Coulling and *Chapman, Peery & Buchanan,* all of Tazewell, for appellants.

Harman & Pobst, of Tazewell, for appellees.

POFF et al. *v.* POFF et al.

NOLLEY et al. *v.* SAME

Sept. 16, 1920.

[104 S. E. 719.]

1. Appeal and Error (§ 333*)—No Abatement in Appellate Court Because of Death after Appeal or Allowance of Writ of Error.—Where an appeal is allowed, or writ of error awarded, before death of party, the case is from that moment a case pending in the appellate court, and, under Code 1887 and Code 1904, § 3307, Code 1919, § 6167, there is no abatement in the appellate court because of the death, the statute effecting no other change in the procedure than that it expressly leaves it to the discretion of the appellate court, where the death is made known to such court and is suggested on its record, to proceed with the case and enter decree as if such death had not occurred.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 529.]

2. Appeal and Error (§ 374 (2)*)—Bond Need Not Be Filed as to Estate of Party Dying after Taking of Appeal.—Under Code 1919, §§ 6351-6355, where a party takes an appeal, and thereafter dies before the expiration of the statutory period within which an appeal bond would have been given had he lived, the continued pendency of the appeal is unquestionably necessary to protect his estate after his death, and the case falls within the provision which exempts cases involving the estates of decedents from the need of the giving of an appeal bond.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 516, et seq.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.